U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32654341

Date: AUG. 27, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner is a quality assurance engineer who seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the record did not establish that the Petitioner had a major, internationally recognized award, nor did she demonstrate that she met at least three of the ten regulatory criteria. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

To qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) of the Act. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-step analysis. In the first step, a petitioner can demonstrate international recognition of his or her achievements in the field

through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then move to the second step to consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (discussing a two-step review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

The Petitioner is a senior quality assurance engineer for an information technology company in the real estate industry. Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). Before the Director, the Petitioner claimed she met four of the regulatory criteria but the Director decided that she did not satisfy any of them. On appeal, the Petitioner reduces her claims to three criteria, and those relate to judging, leading or critical role, and a high salary. After reviewing all the evidence in the record, we conclude she has not demonstrated she is eligible for this restrictive immigrant classification.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

Within the appeal, the Petitioner does not raise any potential errors in the Director's decision. Instead, she implies that there is some confusion with her affiliation with [redacted] and she clarifies that they are not her employer. Rather, she indicates they sought her expertise to mentor students. A review of the Director's request for evidence (RFE) reflects they mentioned this organization as her employer in addition to notifying the Petitioner that the record did not contain evidence demonstrating she actually participated in judging the work of others.

But the Petitioner's RFE response made no mention that [redacted] was not her employer and she resubmitted the same evidence in that response that was already part of the record, and that the Director informed her was inadequate. It is only now in the appeal that the Petitioner presents the claim that [redacted] is not her employer.

The evidence relating to [redacted] only reflects the organization is a bootcamp where students learn software quality assurance, and that the Petitioner worked for them for more than two years as a coordinator for "meetups" and as a mentor for bootcamp students. The record lacks adequate and probative evidence to demonstrate the Petitioner's responsibilities at [redacted] as a mentor constitutes serving in a judging capacity as anticipated by the regulation. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence of the alien's participation, either individually or on a

panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought."

Serving as a mentor as part of one's normal responsibilities does not equate to participation as a judge of the work of others in the field. The regulation cannot be read to include every common instance of mentoring bootcamp students. There is insufficient evidence in the record demonstrating that the Petitioner actually served "as a judge of the work of others." And finally, the Petitioner provides no explanation describing how judging the performance of bootcamp students constitutes judging "the work of others in the same or an allied field."

While the Director's decision did include some language about this company being the Petitioner's employer, their decision under this criterion was not wholly based on this aspect. Both the RFE and the denial informed the Petitioner that the evidence she offered did not meet this criterion's requirements. As such, the Director's indication that [redacted] was the Petitioner's employer amounts to a harmless error.

It is not enough to demonstrate errors in an agency's decision; a petitioner must also establish they were prejudiced by the mistakes. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016). As the Petitioner has not demonstrated she was prejudiced by the Director's error, such a lapse in propriety is harmless and is insufficient grounds upon which to base this appeal. Errors can be overlooked when they had no bearing on the substance of an agency's decision. *Aguilar v. Garland*, 60 F.4th 401, 407 (8th Cir. 2023) (citing *Prohibition Juice Co. v. United States Food & Drug Admin.*, 45 F.4th 8, 24 (D.C. Cir. 2022)). The party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Shinseki*, 556 U.S. at 409 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)); *Molina-Martinez*, 578 U.S. at 203.

Because the Director's RFE notified the Petitioner that her claims and evidence were inadequate but she offered nothing new in response, and the sole issue she raises in the appeal amounts to a harmless error on the Director's part, she has not demonstrated that she can fulfill this criterion's requirements.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

The Director discussed the evidence submitted for this criterion and found that the Petitioner did not establish her eligibility. On appeal, the Petitioner does not contest the Director's findings for this criterion or offer additional arguments. Therefore, the Petitioner has abandoned or waived her eligibility claims under this criterion. *E.g.*, *Matter of Zhang*, 27 I&N Dec. 569, 569 n.2 (BIA 2019) (finding that an issue not appealed is deemed as abandoned).

Turning to the two remaining criteria, we conclude that although the Petitioner claims she meets three criteria, because her arguments fail on the judging criterion discussed above, that means she cannot numerically meet the required number of criteria and it is unnecessary for us to make a decision on these additional grounds. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3), we reserve these the remaining issues of her leading or critical role and her high salary. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429

U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of M-R-M-S-*, 28 I&N Dec. 757, 764 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we do not need to provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119–20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward that goal. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown the significance of their work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A). Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and they are one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated her eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.